To understand the dispute over Petitioner White's fee application, it is necessary to review applicable EAJA principles and the Veterans Court's precedent regarding the substantially justified requirement.

The EAJA was first enacted in 1982. Congress' stated purpose was "to diminish the deterrent effect of seeking review of, or defending against, governmental action." Preamble, Pub. L. 96-481, §202(c)(1), 94 Stat. 2325. Congress struck a balance between the interests of the government and the interests of private parties by requiring four elements: 1) a showing that the applicant is a prevailing party; 2) a showing that the applicant is a party eligible for an award because his or her net worth does not exceed $2,000,000; 3) an allegation that the Secretary's position was not substantially justified; and 4) an itemized statement of attorney fees and expenses sought. 28 U.S.C. §2412(d)(1)(B); *Scarborough v. Principi*, 541 U.S. 401, 124 S. Ct. 1856, 1862, 158 L. Ed. 2d 674 (2004). The third element, substantial justification, is at issue in Petitioner White's appeal.

Congress put the burden on the government to demonstrate that its conduct was substantially justified. *See*, S.Rep. No. 96-974, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4726, 4989 (stating that the allegation of lack of substantial justification is intended "to place the burden on the government to make a positive showing that its position and actions during the course of the proceedings were substantially justified."); and, *Pierce v. Underwood, supra,* 487 U.S. at 565 (to meet the substantial justification standard, the government bears the burden of showing that its position had a "reasonable basis both in law and fact.").

In the context of an agency's promulgation and enforcement of a facially invalid regulation, the Veterans Court's *Johnson* rule deems the government to have met its burden of demonstrating substantial justification if the judicial decision which invalidated the regulation was a case of first impression and there was no "prior adverse reaction" to the promulgation of the invalid regulation. The *Johnson* rule is based on the Veterans Court's case law in *Felton* and *Ozer, infra.*

In the merits litigation in *Felton v. Brown*, 4 Vet. App. 363 (1993) (*Felton I*), and *Ozer v. Principi*, 14 Vet. App. 257 (2001) (*Ozer I*) the Veterans Court invalidated regulations which exceeded the Secretary's statutory authority. However, in the subsequent EAJA litigation, *Felton v. Brown*, 7 Vet. App. 276 (1994) (*Felton II*), and *Ozer v. Principi*, 16 Vet. App. 475 (2002) (*Ozer II*), the Veterans Court denied the appellants' EAJA petitions, finding that the Secretary was substantially justified in promulgating his regulations even though the regulations were contrary to the unambiguous language of the controlling statutes.

In the underlying *Johnson* merits litigation (summarized in the EAJA decision, *Johnson, supra,* 17 Vet. App. 436), the Veterans Court vacated the Board's decision because of the Federal Circuit's *DAV* decision which invalidated 38 C.F.R. § 19.9(a)(2) – the same regulation which the Board relied upon to deny Petitioner White's claim. In the subsequent *Johnson* EAJA litigation, the Veterans Court observed that the underlying merits decisions on the validity of the regulations in *Felton I* and *Ozer I* were indistinguishable: in each case, the regulation was invalid because it was contrary to the plain meaning of the controlling statute. The *Johnson* decision then

reaffirmed the *Felton/Ozer* substantial justification analysis at 17 Vet. App. at 441:

> [Appellant Johnson] has failed to show how the instant case is distinguishable from either *Ozer II* or *Felton II*. Because the Court holds that the Federal Circuit's holding in *DAV v. Sec'y, supra,* is premised on the same reasoning as *Ozer I* and *Felton I,* and that, as in those cases, *DAV v. Sec'y* was a case of first impression and there had been no prior adverse reaction to the proposed revision of regulatory §19.9(a)(2), it cannot be said that the Secretary was unreasonable in promulgating that regulation.

Applying the *Johnson* rule, the Veterans Court denied Petitioner's White's fee application. App. 14.

D. Petitioner White's EAJA decision in the Federal Circuit

Petitioner White appealed to the Federal Circuit from the Veterans Court's denial of his EAJA petition. He argued that the government's substantial justification burden required it to show that a reasonable person would conclude that the Secretary had a reasonable, albeit incorrect, basis in law to think that Congress had authorized him to act contrary to the plain meaning of the controlling statute. He also argued that the Veterans Court erred by basing its substantial justification decision on the absence of a prior judicial decision instead of reviewing the reasonableness of the government's regulatory action in light of the plain language of the controlling statute.

The panel majority found the Veterans Court's reasoning in *Johnson* to be persuasive and affirmed its application to Petitioner White's case. App. 2, footnote 1; App. 7-8. The panel majority explained that in *Johnson*, the Veterans Court found the government to be substantially justified under a totality of the circumstances test, specifically, that the *DAV* decision which invalidated the Secretary's regulation was a case of first impression and there was no prior adverse reaction to the VA's proposed revision of Section 19.9(a)(2). App. 6.

Judge Mayer dissented. App. 8. He stated that the Veterans Court committed legal error by failing to consider the significance of the unambiguous language of the controlling statute, App. 9. He reasoned, at App. 10-11:

> The actions or positions taken by VA that are contrary to statute must be weighed as part of the record of the overall determination of whether the Secretary's position was "substantially justified." When the Secretary adopts and relies upon a regulation that adversely affects a claimant's rights, and that regulation subsequently fails under the first prong of *Chevron* [footnote omitted] because it is facially invalid, the government bears a heavy burden to later prove that its position was "substantially justified" based upon the invalid regulation. . . . When the Secretary chooses to ignore Congress' intent by adopting a regulation contrary to law, the VA cannot then hide behind the lack of a "prior adverse reaction" as the only support for its actions. In doing so, his position was not substantially justified.

Petitioner White petitioned the Federal Circuit for rehearing or rehearing *en banc*. On September 13, 2005, the Federal Circuit denied the petition. App. 10.

REASONS FOR GRANTING THE WRIT

A. The Federal Circuit's decision creates a division among the Federal Courts of Appeals on an important issue of federal law

The Federal Circuit's decision directly conflicts with the decisions of other federal circuit courts of appeal which have addressed whether the government's promulgation and enforcement of facially invalid regulations was, nevertheless, substantially justified.

The Court of Appeals for the District of Columbia Circuit rejected the equivalent of the *Johnson* rule in *Halverson v. Slater*, 206 F.3d 1205 (D.C. Cir. 2000), cited for support in *Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 967 (D.C. Cir. 2004). In the *Halverson* merits litigation, the agency's rule was contrary to the plain language of the statute, so the appeals court invalidated the rule under step one of the *Chevron* test. *Halverson, supra*, 206 F.3d at 1207. However, in the subsequent EAJA litigation, the district court denied the plaintiff's EAJA application on the ground that the government was substantially justified in promulgating a facially invalid rule.

The district court's denial of an EAJA award was reversed by the D.C. Circuit. It rejected the argument that the absence of existing case law on the controlling merits issue demonstrates the government's substantial justification in promulgating a facially invalid regulation – the

very element that is the linch pin of the *Johnson* rule, which the Federal Circuit found persuasive in Petitioner White's case. The D.C. Circuit explained that there may be no contrary case law for reasons having nothing at all to do with whether the government's position had merit. *Halverson, supra,* 206 F.3d at 1209-1210. Citing to its decision in *F.J. Vollmer v. Magaw*, 102 F.3d 529 (D.C. Cir. 1996), the D.C. Circuit Court of Appeals stated that the lower court "must analyze the merits panel's reasoning to determine whether the Department's position, though rejected, was substantially justified." Noting that the merits panel thought the issue before it was "easy" and that it invalidated the agency's rule on step one *Chevron* grounds, *Halverson, supra,* 206 F.3d at 1211, the D.C. Circuit found that the agency " . . . has failed to demonstrate that its position was substantially justified for a very good reason: the merits panel, as even a cursory review of its opinion reveals, found the Department's position entirely without merit." *Id.*

The Seventh Circuit also rejected the equivalent of the *Johnson* rule in *Marcus v. Shalala,* 17 F.3d 1033 (7th Cir. 1994) (rehearing and suggestion for rehearing denied *en banc* May 24, 1994). In the underlying merits litigation, the *Marcus* plaintiffs successfully argued that the agency's regulations were contrary to the controlling statute and therefore invalid. The agency appealed the district court's ruling in favor of the plaintiffs. While that appeal was pending, the U.S. Supreme Court, in another case, issued a decision which was consistent with the district court's merits decision in *Marcus,* and the agency subsequently withdrew its appeal. *Marcus, supra,* 17 F.3d at 1035.

The *Marcus* district court's EAJA decision held that the government did not meet its burden of demonstrating

that its promulgation of facially invalid regulations was substantially justified. The Seventh Circuit affirmed. Its substantial justification analysis focused on whether the agency's merit position was a close call. It found no abuse of discretion in the lower court's substantial justification finding, pointing to the strong Supreme Court language that the regulations were manifestly contrary to statute and exceeded the Secretary's statutory authority. "Thus the Court did not even consider the issue to be a close one." *Marcus, supra,* 17 F.3d at 1038.

The conflict between the decisions of the appellate courts for the District of Columbia Circuit and the Seventh Circuit cannot be reconciled with the decision of the Federal Circuit. If the agency's regulation is invalid under *Chevron's* step one, then these two courts require the government to demonstrate that it nevertheless had a reasonable, albeit incorrect, basis in law to promulgate and enforce its invalid regulation. Consistent with the reasoning in Judge Mayer's dissent in Petitioner White's case, they do not permit the government to "hide behind the lack of a 'prior adverse reaction' as the only support for its actions."

In contrast, the Federal Circuit's approval of the *Johnson* rule requires the very result which the District of Columbia and Seventh Circuits bar: a finding of substantial justification based on nothing more than absence of prior case law. This rule relieves the Secretary of his statutory burden to demonstrate that a reasonable person could think that he had a reasonable basis in law to promulgate regulations contrary to the plain language of the statute.

This division among the appellate circuits is irreconcilable. The question presented is important and should be resolved by this Court.

This Court has stated that the

> . . . specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions. . . . The Government's general interest in protecting the federal fisc is subordinate to the specific statutory goals of encouraging private parties to vindicate their rights and "curbing excessive regulation and the unreasonable exercise of Government authority."

Commissioner, INS v. Jean, 496 U.S. 154, 164-165, 110 S. Ct. 2316, 2321-2322, 110 L. Ed. 2d 134 (1990). The *Johnson* rule erodes the EAJA because it restores the financial disincentive for private citizens to challenge agency conduct, even when the agency's regulatory conduct deprives them of statutory rights.

If the decision below is not corrected, it will have an adverse effect on disabled military veterans. The expense of a court challenge will deprive those veterans without any resources from vindication of their statutory rights, and it will deter those for whom the expense of litigation may outweigh the potential financial gain. This undermines the very purpose of the EAJA. *See,* H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4988 (one of Congress' concerns in enacting EAJA was that the cost of contesting a Government order can exceed the amount at stake).

The *Johnson* rule has already had an adverse effect on veterans and their dependents who have successfully

appealed from agency denials which were based on facially invalid regulations, but whose EAJA petitions were denied because of the absence of prior case law on the question of the validity of the regulation. *See, Ozer, Felton, Johnson, supra.* In addition to Petitioner White's case, a non-exhaustive list of cases in which the Veterans Court vacated the Board of Veterans' Appeals wrongful denial of claims based on the Secretary's promulgation of 38 C.F.R. §19.9(a)(2), yet denied the claimants' EAJA petitions on the ground that the Secretary's promulgation of his facially invalid regulation was substantially justified includes: *Younker v. Nicholson*, 2005 WL 1866121 (Vet. App. May 19, 2005); *Simmonds v. Principi*, 19 Vet. App. 61 (Table), 2004 WL 2525843 (Vet. App. Oct. 14, 2004); *Willett v. Principi*, 18 Vet. App. 498 (Table), 2004 WL 503868 (Vet. App. Mar. 3, 2004); *Crank v. Principi*, 18 Vet. App. 498 (Table), 2004 WL 395967 (Vet. App. Mar. 1, 2004); *Leo v. Principi*, 18 Vet. App. 492 (Table), 2004 WL 396102 (Vet. App. Feb. 13, 2004); *Myers v. Principi*, 18 Vet. App. 492 (Table), 2004 WL 314917 (Vet. App. Feb. 6, 2004).

Finally, the fact that Petitioner White's decision is from the Federal Circuit enhances its importance. In addition to the large number of EAJA applications filed in the Veterans Court,[1] the Federal Circuit's precedent is controlling on other proceedings which give rise to potential EAJA liability. *See, e.g.*, 28 U.S.C. §1295(a)(10) (government contract cases); 28 U.S.C. §1295(a)(9) (appeals from decisions of the Merit System Protection Board).

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[1] In 2003, a total of 1559 EAJA applications were filed in the Veterans Court. In 2004, a total of 1048 EAJA applications were filed. *See*, CAVC Annual Reports (http://www.vetapp.uscourts.gov/About Court/Annual%20Reports.pdf).

B. The decision below is inconsistent with this Court's decisions in *Pierce v. Underwood* and *Chevron*

The Federal Circuit's decision is inconsistent with *Pierce v. Underwood*, 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988). When the EAJA determination turns on agency conduct which presents a purely legal issue, the substantial justification analysis requires the court to determine what the agency was substantially justified in believing the law to have been. *Pierce, supra*, 487 U.S. at 560-561. Substantially justified means a reasonable basis in law and fact, that is, even though the government's position is not correct, it will be substantially justified if a reasonable person could think it correct. *Pierce, supra*, 487 U.S. at 565; and, footnote 2 at 487 U.S. at 565.

When the underlying merits issue is the validity of a regulation – purely a question of law – the determination of reasonableness cannot be divorced from the *Chevron* analysis in the merits litigation, at least when the regulation is invalidated under *Chevron's* step one.

Under the *Chevron* framework, if reasonable minds could differ as to the proper interpretation of the controlling statute, that is, if the statutory language is sufficiently ambiguous or complex as to leave any room for discretion, then the reviewing court's analysis in the merits case must proceed, as a matter of law, to *Chevron's* step two. *Chevron, supra*, 467 U.S. at 842-843.

However, when the statutory language is clear and unambiguous, and the merits panel invalidates the agency's regulation under *Chevron's* step one, the subsequent EAJA question of whether the agency has met its burden of demonstrating substantial justification is an

issue of law which should be resolved against the agency. Because *Chevron, supra,* 467 U.S. at 842-843 holds that if the intent of Congress is clear, then the court as well as the agency "must give effect to the unambiguously expressed intent of Congress[,]" there is no basis in law upon which a reasonable person could think the agency has authority to do otherwise. As *Chevron* says, if Congress' intent is clear, "that is the end of the matter." *Id.*

This analysis is consistent with *Federal Election Commission v. Political Contributions Data, Inc.*, 995 F.2d 383 (2nd Cir. 1993), cert. den., *Federal Election Commission v. Political Contributions Data, Inc.*, 510 U.S. 116, 114 S. Ct. 1065 (1994). The merits issue required the court to determine the meaning of the controlling statute in order to decide whether the Federal Election Commission adopted an unreasonably restrictive interpretation of the statute and its own regulation. The merits panel found the Commission's position unreasonable in light of the plain language and legislative history of the statute. Citing to *Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330 (9th Cir. 1992), the Second Circuit found that the merits panel's decision was conclusive on the subsequent substantial justification analysis. "Like the Ninth Circuit, '[w]e come to this conclusion not because the government lost its claim, but because a previous panel of this court determined that the statutory language and the legislative history were clear.' 980 F.2d at 1332." The court concluded that, "It would be hard to imagine how it could be held that one had been 'substantially justified' in defying the will of Congress and jeopardizing First Amendment rights."

This analysis is consistent with the Seventh Circuit's decision in *Halverson, supra,* 206 F.3d at 1210-1213, which

stopped short of adopting a per se rule based on *Chevron,* but nevertheless found the government did not meet its substantial justification burden as a matter of law where the merits panel's rejection of the agency's regulation under *Chevron* step one rested on "the easily ascertainable plain meaning" of the controlling statute. *Id.* at 1212.

The Federal Circuit's decision in Petitioner White's case is contrary to *Pierce's* reasonable basis in law standard, which requires the court to determine what the agency was substantially justified in believing the law to have been, based on an objectively reasonable standard. Under the decision in Petitioner White's case, the agency need not demonstrate that it had any legal ground to believe that it had authority for its position – the promulgation and enforcement of a regulation which violated the plain meaning of the statute. The agency need only show that a court had not previously called it on its position. As the D.C. Circuit observed, this may have nothing to do with the question of reasonableness of the agency's conduct. *Halverson, supra,* 206 F.3d at 1210.

Petitioner White submits that when a merits panel invalidates the agency's regulation under *Chevron's* step one because the controlling statute is unambiguous and the agency's regulation is contrary to the statute, and the merits panel holds that the agency has "no choice" but to comply with the statute, the absence of a prior court decision does not demonstrate that the agency's defiance of Congress' will was, nevertheless, substantially justified under *Pierce*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

04-7136

MONROE WHITE, Sr.,

Claimant-Appellant,

v.

R. JAMES NICHOLSON, Secretary of Veterans Affairs,

Respondent-Appellee.

ORDER

Sandra E. Booth, of Columbus, Ohio, argued for claimant-appellant.

Ronald G. Morgan, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, and Mark A. Melnick, Assistant Director. Of counsel on the brief were Michael J. Timinski, Deputy Assistant General Counsel, and Martie S. Adelman, Attorney, United States Department of Veterans Affairs, of Washington, DC.

Appealed from: United States Court of Appeals for Veterans Claims

Retired Judge Kenneth B. Kramer

DECIDED: June 16, 2005

Before MAYER, RADER, and GAJARSA, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* RADER. Dissenting opinion filed by *Circuit Judge* MAYER.

RADER, *Circuit Judge*.

The United States Court of Appeals for Veterans Claims (Veterans Court) denied Monroe White, Sr. attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (2000). The Veterans Court determined that the Secretary's position at the administrative and litigation levels was "substantially justified." *White v. Principi*, 18 Vet. App. 539 (Vet. App. 2004) (Order). Because the Veterans Court applied the proper burden of proof and considered the entire record in following its own precedent in *Johnson v. Principi*, 17 Vet. App. 436 (Vet. App. 2004), this court affirms.[1]

I.

On October 3, 2002, the Board of Veterans Appeals (Board) denied Mr. White's 1993 claim for service connection for a lower back injury. Mr. White appealed. On August 27, 2003, the Veterans Court vacated the Board's decision and remanded for readjudication consistent with this court's opinion in *Disabled American Veterans (DAV)*

[1] As a procedural matter, the Veterans Court was correct to follow their own precedent in *Johnson v. Principi*, 17 Vet. App. 436 (Vet. App. 2004). While this court is not bound to follow *Johnson*, this court finds the reasoning in *Johnson* to be persuasive as to the substantial justification of the Government in the present case.

v. Secretary of Veterans Affairs, 327 F.3d 1339 (Fed. Cir. 2003). *DAV* invalidated 38 C.F.R. § 19.9(a)(2).[2]

Thereafter, Mr. White filed an application for reimbursement of legal fees and expenses under the EAJA. The EAJA provides:

> [A] court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . unless the court finds that the position of the United States was *substantially justified* or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (2000) (emphasis added). The Veterans Court denied Mr. White's EAJA application, concluding that the Secretary's position at the administrative and litigation levels was "substantially justified." Because *DAV* was a case of first impression and the record did not include any "prior adverse reaction" to the application of § 19.9(a)(2), the Veterans Court held that the Secretary was substantially justified in his positions at both the administrative and litigation stages. Mr. White filed a notice of appeal to this court.

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[2] *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1346-47 (Fed. Cir. 2003). The Federal Circuit found a Department of Veterans Affairs (VA) regulation allowing the Board of Veterans Appeals (Board) to consider additional evidence without remanding the case to the agency of original jurisdiction for initial consideration and without having to obtain the appellant's waiver was inconsistent with the statute entitling appellants to "one review on appeal to the Secretary." The regulation was thus invalid. *See* 38 U.S.C. § 7104(a) (2000); 38 C.F.R. § 19.9(a)(2) (2002).

II.

This court applies an abuse of discretion standard to a lower court's decision regarding attorney fees under the EAJA. *Pierce v. Underwood*, 487 U.S. 552 (1988). The EAJA requires the Government to show that its position during the course of proceedings was substantially justified. 28 U.S.C. § 2412(d)(1)(A) (2000). As stated in *Pierce*, the position of the Government is substantially justified when it is justified to a degree which would satisfy a reasonable person. *Pierce*, 487 U.S. at 565. "[T]he fact that one court agreed or disagreed with the Government does not establish whether or not its position was substantially justified." *Id.* at 569. Hence, under *Pierce*, it is not enough for a regulation to be deemed facially invalid on the basis of contradicting the overarching legislation. In order for the Government to be deemed unjustified in enforcing a regulation, something else must also be present.

Mr. White contends that the Veterans Court mistakenly shifted the burden of proof to require him to show the "something else," namely that the Secretary's conduct was unreasonable. The record does not show that the Veterans Court improperly shifted the burden from the Government to Mr. White. Rather, the court's language shows that it applied the correct standard. The Veterans Court four times invokes the proper "substantially justified" standard in a two-page order. After summarizing the procedural history, the Veterans Court examined the merits of Mr. White's claim:

> In the instant case, even assuming that . . . the appellant is a prevailing party, his application must be denied because the Secretary's position

> at the administrative and litigation stages was *substantially justified.*

Order at 2 (emphasis added) (citations omitted). The Veterans Court's reference to the proper standard shows proper application of 28 U.S.C. § 2412(d)(1)(A).

Mr. White relies on other language from the Order to argue that the Veterans Court impermissibly shifted the burden. He contends that the Veterans Court misapplied the applicable regulation in remarking: "[I]t could not be said that [the Government] was unreasonable in promulgating [38 C.F.R. § 19.9(a)(2)]." *Order* at 3. Mr. White contends this language required him to carry the burden of showing the Secretary acted unreasonably. However, this language merely describes the Veterans Court's own holding in *Johnson*, 17 Vet. App. at 442, and cannot be construed as shifting the burden to the fee applicant. *Helfer v. West*, 174 F.3d 1332, 1336 (Fed. Cir. 1999) (holding lower court did not misinterpret EAJA and shift burden of showing the Government acted without substantial justification to veteran, where the court simply pointed out that the veteran's arguments on that issue were unpersuasive). In fact, the contested phrase merely employs a double negative to restate the correct standard. Read in its complete context, the brief Order makes clear the Veterans Court understood and applied the correct standard in this case.

EAJA also requires that the record must supply the evidence of the Government's substantial justification. 28 U.S.C. § 2412(d)(1)(B). Mr. White contends that the Veterans Court limited the record to include only case law at the time the Government adopted its position. Mr.

White argues this limitation of the record impermissibly excluded statutory law supporting his position.

The Veterans Court did not improperly limit the record. In making its determination, the Veterans Court applied the standard outlined in *Johnson*. 17 Vet. App. at 440. In *Johnson*, a case with virtually identical facts, the Veterans Court addressed the effect of *DAV*'s invalidation of § 19.9(a)(2) on an EAJA claim. 17 Vet. App. at 442. In denying the EAJA claim in that case, the Veterans Court stated that the Government's position at the administrative stage of the proceedings was substantially justified under a totality of the circumstances. *Id.* The Veterans Court based this conclusion on the record that showed *DAV* was a case of first impression and that showed no prior adverse reaction to the VA's proposed revision of 38 C.F.R. § 19.9(a)(2).[3] The *Johnson* standard centers the

[3] *Johnson* relied on two substantially similar cases in which the Veterans Court had invalidated VA regulations. *See Ozer v. Principi*, 14 Vet. App. 257, 264 (2001) (*Ozer I*) (holding 38 C.F.R § 211.3046(c) invalid as in contravention of 38 U.S.C. § 3512); *Felton v. Brown*, 4 Vet. App. 363, 371 (1993) (*Felton I*) (holding 38 C.F.R. § 3.558(c)(2) invalid in light of 38 U.S.C. § 501(a)). The appellants in both *Felton I* and *Ozer I* subsequently litigated EAJA claims. *Felton v. Brown*, 7 Vet. App. 276 (1994) (*Felton II*); *Ozer v. Principi*, 16 Vet. App. 475 (2002) (*Ozer II*). In the Equal Access to Justice Act (EAJA) litigation, the Veterans Court commented: "Although we held in the underlying case on the merits that the Secretary's interpretation of the statute, as set forth in [the regulation], was in excess of statutory authority, we cannot say that the Secretary's position had no reasonable basis in law or in fact." *Felton II*, 7 Vet. App. at 283. Similarly, in *Ozer II*, the Veterans Court held that the Secretary's position in promulgating the regulation was substantially justified, despite a later invalidation of the regulation at issue in that case, because the "case was one of first impression", "there was no prior disapproval of or challenge to the regulation", and a reasonable person could find that the Secretary's position was reasonably based in fact or law. 16 Vet. App. at 479.

inquiry for a substantial justification on "the totality of the circumstances." *Id.* This standard considers, among other things, "merits, conduct, reasons given, and consistency with judicial precedent and VA policy with respect to such position, and action or failure to act, as reflected in the record on appeal and the filings of the parties before the [Veterans Court]." *Id.* (quoting *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994)). The totality of the circumstances, by its very description, does not exclude any valid issue from consideration. The Veterans Court properly applied that rule in this case.[4]

The Veterans Court found the Secretary's position was substantially justified because "the Board clearly relied upon then-current law." *Johnson*, 17 Vet. App. at 442. (quoting *Clemmons v. West*, 12 Vet. App. 245, 247 (1999)); *see also Owen v. United States*, 861 F.2d 1273, 1275 (Fed. Cir. 1988) (holding that "the position of the government [is] substantially justified when it [is] taken, based on precedents then standing", even though they are later overruled). The Order's reference to *Johnson* supports the conclusion that the Veterans Court properly relied on "then-current law" in determining that the Secretary was substantially justified in applying the regulation. *Johnson*, 17 Vet. App. at 442. Mr. White has not shown any reason to differ from the persuasive reasoning of *Johnson*.

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[4] In the present case, the Veterans Court discussed the Secretary's conduct in promulgating and enforcing the regulation as part of its analysis and review of *Ozer II* and *Johnson*, which found the Secretary's actions substantially justified under similar circumstances. *Order* at 2-3.

III.

For the foregoing reasons, this court affirms the Veterans Court holding that the Government met its burden of demonstrating that the Secretary's position at the administrative and litigation levels was substantially justified. This court further finds the Veterans Court's determination was based on the whole record, including relevant statutory law.

COSTS

Each party shall bear its own costs.

AFFIRMED

MAYER, *Circuit Judge*, dissenting.

The United States Court of Appeals for Veterans Claims ("Veterans' Court") denied Monroe White's Equal Access to Justice Act ("EAJA") application because the Department of Veterans Affairs' ("VA's") position at the administrative and litigation stages was substantially justified. *White v. Principi*, No. 02-1827 (Vet. App. Apr. 6, 2004). Because the Veterans' Court erred in its analysis by failing to consider the significance of the VA's adoption and reliance upon a regulation that was facially invalid, I would reverse.

White filed an appeal to the Veterans' Court following an October 2002 Board of Veterans' Appeals ("board") decision denying his 1993 claim for service connection of a back injury. The board's decision weighed evidence not previously considered by the agency of original jurisdiction ("AOJ"). As a result, on August 27, 2003, the Veterans'

Court vacated the board's decision and remanded for adjudication consistent with our decision in *Disabled American Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003) ("*DAV*"). *White v. Principi*, No. 02-1827(E) (Vet. App. Aug. 27, 2003).

DAV addressed the validity of 38 C.F.R. § 19.9(a)(2),[1] which permitted the board to consider evidence not before the AOJ. Analyzing the regulation, we held "that 38 C.F.R. § 19.9(a)(2) is invalid because, in conjunction with the amended rule codified at 38 C.F.R. § 20.1304, it allows the Board to consider additional evidence without having to remand the case to the AOJ for initial consideration and without having to obtain the appellant's waiver." *DAV*, 327 F.3d at 1341. We based this decision on the fact that "Congress unambiguously addressed this issue in 38 U.S.C. § 7104(a) by decreeing that '[a]ll questions in a matter which . . . is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary.'" *Id.* at 1347 (quoting 38 U.S.C. § 7104(a) (2000)). Section 19.9(a)(2) ignored the statute by allowing the board to consider evidence not before the AOJ, which precluded the claimant from at least one appeal to the Secretary. Thus, we concluded that the regulation promulgated by VA was facially inconsistent with 38 U.S.C. § 7104(a) and invalid. *Id.* at 1346-47.

The Veterans' Court committed legal error in this case by limiting the record to judicial precedent existing at the time the Secretary adopted his position, and by failing to

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[1] This version of 38 C.F.R. § 19.9(a)(2) became effective February 22, 2002. *See* Board of Veterans' Appeals: Obtaining Evidence and Curing Procedural Defects Without Remanding, 67 Fed.Reg. 3099-3100 (Jan. 23, 2002).

consider the significance of the unambiguous language of a controlling statute. The "EAJA authorizes the payment of fees to a prevailing party in an action against the United States; the Government may defeat this entitlement by showing that its position in the underlying litigation 'was substantially justified.'" *Scarborough v. Principi*, 541 U.S. 401, 405 (2004). "Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought." 28 U.S.C. § 2412(d)(1)(B) (2000). The governmental action that formed the basis of the remand in this case was the Secretary's promulgation of a facially invalid regulation. The Veterans' Court reasoned that because our *DAV* decision was a case of first impression and because there had been no "prior adverse reaction" to application of the regulations at issue, it could not be said that the Secretary was unreasonable in promulgating section 19.9(a)(2).

The actions or positions taken by VA that are contrary to statute must be weighed as part of the record in the overall determination of whether the Secretary's position was "substantially justified." When the Secretary adopts and relies upon a regulation that adversely affects a claimant's rights, and that regulation subsequently fails under the first prong of *Chevron*[2] because it is facially

[2] The first prong of the *Chevron* analysis asks "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If so, courts, "as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 843.

invalid, the government bears a heavy burden to later prove that its position was "substantially justified" based upon the invalid regulation. "Substantially justified" means "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). A reasonable person would weigh the Secretary's conduct – not only during adjudication proceedings, but also at the outset – in the promulgation of a regulation that impinges on the substantive rights of veterans. When the Secretary chooses to ignore Congress' intent by adopting a regulation contrary to law, the VA cannot then hide behind the lack of a "prior adverse reaction" as the only support for its actions. In doing so, his position was not substantially justified.

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 02-1827(E)

MONROE WHITE, SR., APPELLANT,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KRAMER, *Chief Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent

In an August 27, 2003, single-judge order, the Court vacated an October 2002 Board of Veterans' Appeals (Board) decision and remanded the appellant's claim for readjudication pursuant to the U.S. Court of Appeals for the Federal Circuit's (Federal Circuit) then-recent (May 2003) opinion in *Disabled American Veterans v. Sec'y of Veterans Affairs (DAV v. Sec'y)*, 327 F.3d 1339, 1341 (Fed. Cir. 2003) (holding 38 C.F.R. § 19.9(a)(2) (2002) invalid because, in conjunction with 38 C.F.R. § 20.1304 (2002), it allows Board to consider additional evidence without having to remand case to agency of original jurisdiction and without having to obtain appellant's waiver, thereby violating 38 U.S.C. § 7104(a)). The appellant subsequently filed, through counsel, an application for an award of attorney fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (EAJA); the Secretary filed a response; and the appellant filed a reply. The EAJA application satisfies all jurisdictional requirements. *See* 28 U.S.C. § 2412(d)(1)(B); *Scarborough v. Principi*, 319 F.3d

1346, 1349-55 (Fed. Cir. 2003), *cert. granted*, ___ U.S. ___, 124 S. Ct. 45 (Sept. 30, 2003); *Bazalo v. West*, 150 F.3d 1380, 1383-84 (Fed. Cir. 1998).

In the instant case, even assuming that the remand in the underlying case was predicated on administrative error and that the appellant is a prevailing party (*see Sumner v. Principi*, 15 Vet. App. 256, 264-65 (2001) (en banc), *aff'd sub nom. Vaughn v. Principi*, 336 F.3d 1351 (Fed. Cir. 2003)), his application must be denied because the Secretary's position at the administrative and litigation stages was substantially justified. *See Ozer v. Principi*, 16 Vet. App. 475, 478-79 (2002) (per curiam order) (holding that Secretary was substantially justified in promulgating regulation that had been invalidated in underlying merits disposition where essence of that merits decision on validity of regulation was that regulation had contravened plain language of statute and therefore was invalid); *Felton v. Brown*, 7 Vet. App. 276, 283-86 (1994); *see also Johnson v. Principi*, 17 Vet. App. 436, 439-42 (2004) (discussing *Ozer* and *Felton*, both *supra*, and holding that, because (1) Federal Circuit's invalidation of 38 C.F.R. § 19.9(a)(2) (2002) in *DAV v. Sec'y*, *supra*, was premised upon same reasoning as underlying cases in *Ozer* and *Felton* and (2) like those cases, *DAV v. Sec'y* was case of first impression and there had been no prior adverse reaction to application of § 19.9(a)(2), it could not be said that Secretary was unreasonable in promulgating regulation; stating further that appellant had failed to demonstrate how that case was distinguishable from *Ozer* and *Felton*); *Wisner v. West*, 12 Vet. App. 330, 334 (1999) (Secretary's litigation position was substantially justified where he quickly moved for remand based on subsequent change in caselaw), *aff'd sub nom. Abbs v. Principi*, 237

F.3d 1342 (Fed. Cir. 2001); *Clemmons v. West,* 12 Vet. App. 245, 247 (1999) (Secretary's position at administrative and litigation stages was substantially justified because VA relied upon then-current law). In this regard, despite the appellant's contentions to the contrary (*see* Appellant's February 17, 2004, Reply at 4-11), the circumstances of the instant case as to substantial justification warrant the same result as in *Johnson, Ozer,* and *Felton,* all *supra.*

On consideration of the foregoing, it is

ORDERED that the appellant's EAJA application is DENIED.

DATED: APR 6 2004

BY THE COURT:

/s/ Kenneth B. Kramer
KENNETH B. KRAMER
Chief Judge

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Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 02-1827

MONROE WHITE, SR., APPELLANT,

V.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KRAMER, *Chief Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent

The appellant, through counsel, appeals an October 3, 2002, Board of Veterans' Appeals (Board or BVA) decision in which the Board denied his claim for service connection for a low back disorder. Record at 3, 7-9. The parties have each filed a brief, and the appellant has filed a reply. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate when, as here, the issue is of relative simplicity and the outcome is not reasonably debatable. *See Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the decision of the Board and remand the matter for further proceedings consistent with this order.

On appeal, the appellant makes several arguments. He contends, inter alia, that the Board's findings of fact are not entitled to deference because the BVA did not accord him the benefit of the doubt in weighing the positive and negative evidence, *see* 38 U.S.C. § 5107(b), and that the medical evidence of record does not support the

Board's conclusion that his low-back disability was not incurred in or aggravated by service. Appellant's Brief (Br.) at 9-19. The appellant thus requests that the Court reverse the Board's denial of service connection. In the alternative, he argues that the Court should vacate the October 2002 Board decision and remand on the ground that the Board did not address 38 C.F.R. § 3.303(b) (chronicity and continuity of symptomatology) or on the ground that the Board failed to obtain from the appellant a waiver of initial consideration by a VA regional office (RO) following the Board's receipt of additional evidence. *Id.* at 19-21. The Secretary concedes the Board "requested an opinion from a VA medical expert" and provided the appellant with an opportunity to waive initial RO consideration but that "[t]he record does not demonstrate that [the a]ppellant's attorney submitted the requested waiver." Secretary's Br. at 2. Thus, the Secretary, inter alia, agrees that the Board decision should be vacated and the matter remanded for the Board to obtain a waiver in compliance with *Disabled American Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1341 (Fed.Cir.2003). *Id.* at 3.

Subsequent to the Board decision in this case, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) issued *Disabled American Veterans v. Sec'y of Veterans Affairs*, in which it held that 38 C.F.R. § 19.9(a)(2) (development by BVA) is invalid because, in conjunction with the amended rule codified at 38 C.F.R. § 20.1304 (2002) (eliminating requirement that appellant waive initial consideration by RO of evidence submitted to Board), it allowed the Board to consider additional evidence, without having to remand the case to an RO for initial consideration and without having to obtain the appellant's waiver. *Disabled American Veterans*, 327 F.3d

at 1341. The Federal Circuit concluded that § 19.9(a)(2) is inconsistent with 38 U.S.C. § 7104(a) because § 19.9(a)(2) denies appellants the "one review on appeal to the Secretary" that section 7104(a) guarantees. *Id.* at 1345-48; *see* 38 U.S.C. § 7104(a); 38 C.F.R. § 19.9(a)(2) (2002). In so concluding, the Federal Circuit explained: "When the Board obtains evidence that was not considered by the [RO] and does not obtain the appellant's waiver . . . an appellant has no means to obtain 'one review on appeal to the Secretary,' because the Board is the only appellate tribunal under the Secretary." *Id.* at 1347. The Federal Circuit further explained that, pursuant to 38 C.F.R. §§ 19.9(a)(2) and 20.1304, "the [appellant] is not effectively able to object to any of the additional evidence obtained by the Board until after the Board weighs the evidence and decides the appeal." *Disabled American Veterans, supra.*

Because the Secretary concedes that the Board did not obtain from the appellant a waiver of RO consideration of the additional evidence obtained by the Board and because the appellant requests that the Court remand the matter for the Board to comply with *Disabled American Veterans,* 327 F.3d at 1341, a remand is necessary under the circumstances of this case in order for the Board to obtain from the appellant a waiver or to remand the matter to the RO for initial consideration of the additional evidence. As to the appellant's assertions of any possible Board errors that would warrant reversal of the Board's October 2002 decision, the Court notes that remand, rather than reversal, is appropriate in order to permit the Board to apply "the correct legal standards." *Tucker v. West,* 11 Vet. App. 369, 374 (1998); *see Hicks v. Brown,* 8 Vet. App. 417, 422 (1995) (reversal is appropriate remedy when there is absolutely no plausible basis for Board decision and where

that decision is clearly erroneous in light of uncontroverted evidence in appellant's favor; remand is appropriate when BVA failed [sic] apply law correctly or failed to provide adequate statement of reasons or bases for decision); *see also Bowling v. Principi,* 15 Vet. App. 1, 15 (2001); *Fletcher v. Derwinski,* 1 Vet. App. 394, 397 (1991). In this regard, the Court notes that it appears that the appellant has not yet raised to the Board any of his arguments regarding the asserted failure to apply 38 U.S.C. § 5107(b) or 38 C.F.R. § 3.303 and, therefore, at this time cannot demonstrate that the Board is likely to repeat any such alleged errors. *See Maggitt v. West,* 202 F.3d 1370, 1377-78 (Fed. Cir. 2000) (this Court is not compelled to hear arguments raised for first time on appeal; in its discretion, Court may remand for BVA to determine such matters in first instance); *see also Best v. Principi,* 15 Vet. App. 18, 20 (2001) (per curiam order) ("A narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication. . . ."). In addition, on remand, the appellant will be permitted to submit additional evidence and argument. *See Kutscherousky v. West,* 12 Vet. App. 369, 372-73 (1999) (per curiam order) (appellant entitled, until 90 days after Board mails to appellant post-remand notice, to submit additional evidence and argument, or to request by end of such 90 days, hearing on appeal at which appellant may submit new evidence).

Accordingly, in order to grant expeditiously the remand that is required in this case, the Court will vacate the October 2002 Board decision and remand the matter to the Board for readjudication consistent with *Disabled American Veterans v. Sec'y of Veterans Affairs,* 327 F.3d 1339, 1341 (Fed. Cir. 2003). The Board shall proceed

expeditiously, in accordance with section 302 of the Veterans' Benefits Improvements Act of 1994, Pub. L. No. 103-446, § 302, 108 Stat. 4645, 4658 (1994) (found at 38 U.S.C. § 5101 note) (requiring Secretary to provide for "expeditious treatment" of claims remanded by Board or Court).

Upon consideration of the foregoing, it is

ORDERED that the October 3, 2002, Board decision is VACATED and the matter is REMANDED to the Board for readjudication consistent with this order.

DATED: AUG 27 2003

BY THE COURT:

/s/ _____
KENNETH B. KRAMER
Chief Judge

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United States Court of Appeals
for the Federal Circuit

ORDER

(Filed Sep. 13, 2005)

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on September 20, 2005.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: September 13, 2005

cc: Sandra E. Booth
Ronald G. Morgan

WHITE V DVA, 04-7136
(CVA – 02-1827)

* *

* Note: Pursuant to Fed. Cir. R. 47.6, this order is not *
* citable as precedent. It is a public record. *

* *

(2)

FILED

FEB 13 2006

OFFICE OF THE CLERK

No. 05-762

In the Supreme Court of the United States

MONROE WHITE, SR., PETITIONER

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the United States Court of Appeals for Veterans Claims did not abuse its discretion in denying attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d), based on a finding that the position of the Secretary of Veterans Affairs was substantially justified in the administrative and litigation phases of this case.

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In the Supreme Court of the United States

No. 05-762

MONROE WHITE, SR., PETITIONER

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 412 F.3d 1314. The opinion of the Court of Appeals for Veterans Claims denying an award of attorney's fees (Pet. App. 12-14) is unreported. The underlying opinion of the Court of Appeals for Veterans Claims upon which the fee application is based (Pet. App. 15-19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2005. A petition for rehearing was denied on September 13, 2005 (Pet. App. 20). The petition for a writ of certiorari was filed on December 9, 2005. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner filed a claim seeking service connection for a lower back injury. Pet. App. 2. On October 3, 2002, the Board of Veterans Appeals (Board) denied petitioner's claim, finding that petitioner's lower back injury was not incurred in, or aggravated by, his service. *Id.* at 2, 15-16. In reaching that conclusion, the Board considered additional evidence that had not been first considered by a Department of Veterans Affairs (VA) regional office. *Id.* at 16. At that time, regulations promulgated by the VA authorized the Board to "undertake the action essential for a proper appellate decision" when "further evidence, clarification of the evidence, correction of a procedural defect, or any other action is necessary for a proper appellate decision." 38 C.F.R. 19.9(a)(2) (2002). Under those regulations, the Board was not required to refer the additional evidence to the regional office for initial review or to seek the appellant's waiver of regional office review. 38 C.F.R. 20.1304 (2002). Petitioner appealed to the United States Court of Appeals for Veterans Claims (CAVC), arguing, *inter alia*, that the medical evidence did not support the Board's finding. Pet. App. 15-16.

2. While petitioner's appeal was pending before the CAVC, the United States Court of Appeals for the Federal Circuit issued a decision in a separate, unrelated case entitled *Disabled American Veterans (DAV)* v. *Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003). In that case, the Federal Circuit held that "38 C.F.R. § 19.9(a)(2) is invalid because, in conjunction with the amended rule codified at 38 C.F.R. § 20.1304, it al-

lows the Board to consider additional evidence without having to remand the case to the [regional office] for initial consideration and without having to obtain the appellant's waiver." *DAV*, 327 F.3d at 1341. The pertinent statute provided that "[a]ll questions in a matter which . . . is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary." *Id.* at 1341-1342 (quoting 38 U.S.C. 7104(a)). In addition, the statute provided that "final decisions on such appeals are made by the Board." *Id.* at 1342 (citing 38 U.S.C. 7104). In the court of appeals' view, the regulations did not satisfy those requirements:

> When the Board obtains evidence that was not considered by the [regional office] and does not obtain the appellant's waiver, * * * an appellant has no means to obtain "one review on appeal to the Secretary," because the Board is the only appellate tribunal under the Secretary.

Id. at 1347. The court of appeals therefore concluded that the regulation was contrary to the expressed intent of Congress, and invalidated it under the first step of the analysis set forth in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

3. Petitioner asked the CAVC to remand his case "for the Board to comply with *Disabled American Veterans*." Pet. App. 17. The "Secretary concede[d] that the Board did not obtain from appellant a waiver of [regional office] consideration of the additional evidence obtained by the Board." *Ibid.* The CAVC vacated the Board's decision and "remand[ed] the matter to the Board for readjudication consistent with *Disabled American Veterans* v. *Sec'y of Veterans Affairs*, 327 F.3d 1339, 1341 (Fed. Cir. 2003)." *Id.* at 18.

4. Petitioner filed an application with the CAVC for an award of attorney's fees pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). Pet. App. 12. The EAJA authorizes the court to award reasonable attorney's fees to a qualifying "prevailing party" in certain civil actions "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A).

The CAVC denied petitioner's application. Pet. App. 12-14. The CAVC found that "even assuming that the remand in the underlying case was predicated on administrative error and that [petitioner] is a prevailing party, his application must be denied because the Secretary's position at the administrative and litigation stages was substantially justified." *Id.* at 13 (citation omitted).

The CAVC based its substantial justification finding on three of its prior decisions in which it had denied EAJA fee applications, each involving a remand that was caused by a court's invalidation of a regulation. Pet. App. 13-14 (citing *Johnson* v. *Principi*, 17 Vet. App. 436 (2004); *Ozer* v. *Principi*, 16 Vet. App. 475 (2002); *Felton* v. *Brown*, 7 Vet. App. 276 (1994)). In one of the prior cases, *Johnson* v. *Principi*, *supra*, the CAVC had considered, and denied, an EAJA application based on a remand for compliance with the decision in *DAV*. In *Johnson*, the CAVC had concluded that the Secretary's reliance on the invalidated regulations was substantially justified because *DAV* "was [a] case of first impression and there had been no prior adverse reaction to application of [38 C.F.R.] § 19.9(a)(2) [and] it could not be said that [the] Secretary was unreasonable in promulgating [the] regulation." Pet. App. 13 (citing *Johnson*, 17 Vet. App. at 439-442). The CAVC found that "the circum-

stances of [petitioner's] case as to substantial justification warrant the same result as in *Johnson*." *Id.* at 14.

5. The court of appeals affirmed. Pet. App. 1-11. The panel majority held that the CAVC had applied the proper burden of proof in concluding that the Secretary's position was substantially justified. *Id.* at 2. Because "[t]he fact that one court agreed or disagreed with the Government does not establish whether or not its position was substantially justified," *id.* at 4 (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 569 (1988)), the court of appeals held that "[i]n order for the Government to be deemed unjustified in enforcing a regulation," "it is not enough for a regulation to be deemed facially invalid on the basis of contradicting the overarching legislation," *ibid.* Instead, the inquiry into "substantial justification" must focus on "the totality of the circumstances" surrounding the government's position. Pet. App. 7.

Considering the totality of the circumstances in this case, and the "virtually identical facts" considered in *Johnson* v. *Principi*, *supra*, the court of appeals concluded that there was no reason to "differ from the persuasive reasoning of *Johnson*." Pet. App. 6-7. The CAVC had not abused its discretion in concluding that "the Government met its burden of demonstrating that the Secretary's position at the administrative and litigation levels was substantially justified." *Id.* at 8.

The dissenting judge concluded that the decision of the CAVC was flawed because it failed to consider the "significance of the unambiguous language of a controlling statute." Pet. App. 9-10. Because the Secretary had promulgated a regulation that contravened the specific language of the statute, the dissenting judge stated that "the government bears a heavy burden to * * *

prove that its position was 'substantially justified' based on the invalid regulation" and concluded that the Secretary's conduct was not substantially justified. *Id.* at 11.

ARGUMENT

The court of appeals correctly held that the CAVC did not abuse its discretion in concluding that the Secretary's position was substantially justified. Further review is not warranted.

1. Petitioner cannot obtain fees under the EAJA because he has not established that he was a "prevailing party." 28 U.S.C. 2412(d)(1)(A). To obtain "prevailing party" status, "a party must receive 'at least some relief on the merits of his claim.'" *Vaughn* v. *Principi*, 336 F.3d 1351, 1356-1357 (Fed. Cir. 2003) (quoting *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001)). A successful motion for remand does not meet that standard when it is not "predicated upon administrative error." *Sumner* v. *Principi*, 15 Vet. App. 256, 264 (2001), aff'd *sub nom. Vaughn* v. *Principi*, 336 F.3d 1351 (Fed. Cir. 2003). "In order for a remand to have been predicated upon administrative error, the remand must have been either (1) directed in a Court opinion, decision, or order that contained a Court recognition of administrative error or (2) granted on the basis of a concession of error by the Secretary." *Johnson* v. *Principi*, 17 Vet. App. 436, 439 (2004) (citing cases). A remand "based on the retroactive application of the Federal Circuit's decision in *DAV v. Sec'y* * * * [is] not a remand based on administrative error" where, as here, the court's remand order "neither directed VA to award benefits * * * nor indicated that remand was based on either a 'Court recogni-